

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

**Oem v Minister Immigration, Citizenship, Migrant Services and
Multicultural Affairs [2023] FedCFamC2G 454**

File number:	MLG 1495 of 2021
Judgment of:	ERROR: REFERENCE SOURCE NOT FOUND RILEY
Date of judgment:	31 May 2023
Catchwords:	MIGRATION – Administrative Appeals Tribunal – partner visa – whether the Tribunal’s decision was vitiated by its misapprehension and misapplication of the relevant criteria – whether the Tribunal erred by not providing the applicants with an opportunity to respond to its doubts.
Legislation:	<i>Migration Act 1958</i> s.5F <i>Migration Regulations 1994</i> r.1.15A, cl.801.2 of Schedule 2
Cases cited:	<i>Hossain v Minister for Immigration and Border Protection</i> (2018) 264 CLR 123; (2018) 359 ALR 1; (2018) 92 ALJR 780; [2018] HCA 34 <i>Huynh v Minister for Immigration and Border Protection</i> (2015) 232 FCR 497; [2015] FCA 701 <i>Shrestha v Minister for Immigration and Border Protection</i> (2018) 264 CLR 151; (2018) 359 ALR 22; [2018] HCA 35 <i>SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs</i> (2006) 228 CLR 152; (2006) 93 ALD 300; (2006) 231 ALR 592; (2006) 81 ALJR 515; [2006] HCA 63
Division:	Division 2 General Federal Law
Number of paragraphs:	61
Date of hearing:	28 March 2023
Place:	Melbourne
Solicitor Advocate for the Applicants:	Joel McComber

Solicitor for the Applicants:	Sentry Law
Counsel for the First Respondent:	Jonathan Barrington
Solicitor for the First Respondent:	The Australian Government Solicitor
Counsel for the Second Respondent:	No appearance
Solicitor for the Second Respondent:	The Australian Government Solicitor

ORDERS

MLG 1495 of 2021

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: **LAY OEM**
First Applicant

SEAK AUN CHOEUING
Second Applicant

SALIM CHOEUING
Third Applicant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE RILEY

DATE OF ORDER: 31 MAY 2023

THE COURT ORDERS THAT:

1. The title of the proceeding be amended so that the name of the first respondent is “Minister for Immigration, Citizenship and Multicultural Affairs”.
2. The decision of the Administrative Appeals Tribunal made on 13 June 2021 in matter number 1806824 be set aside.
3. The matter be remitted to the Administrative Appeals Tribunal for determination according to law.
4. The first respondent pay the applicants’ costs of the proceeding fixed in the sum of \$8,371.30.
- 5.
6. Note: The form of the order is subject to the entry in the court’s records.
7. Note: This copy of the court’s reasons for judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and*

Family Court of Australia (Division 2) (General Federal Law) Rules 2021 (Cth)), or to record a variation to the order pursuant to r 17.05 Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021 (Cth)..

REASONS FOR JUDGMENT

JUDGE RILEY:

INTRODUCTION

- 1 This is an application for review of a decision made by the Administrative Appeals Tribunal. In that decision, the Tribunal affirmed a decision of a delegate of the Minister not to grant the applicants partner visas under s.65 of the *Migration Act 1958* (“the Act”).
- 2 The first applicant (“Ms Oem”) is the mother of the second and third applicants. Ms Oem was the primary applicant. The second and third applicants were secondary applicants. The second and third applicants are now adults. At the time of the visa application, on 9 July 2013, the second applicant was 16 years old and the third applicant was 18 years old.
- 3 At the time of the visa application, Ms Oem was a 48 year old citizen of Cambodia. She applied for a Partner (Temporary) (Class UK) (Subclass 820) visa and a Partner (Residence) (Class BS) (Subclass 801) visa at the same time. The application was made on the basis that she was in a spousal relationship with Mr Ny Phith. Mr Phith at that time was 51 years old. He is an Australian citizen.
- 4 The second and third applicants are Ms Oem’s children from a previous relationship. Mr Phith has four children from a previous relationship.
- 5 On 9 July 2013, the applicants were granted temporary partner (Subclass 820) visas. However, on 27 February 2018, the delegate refused to grant the applicants permanent partner (Subclass 801) visas. The delegate was not satisfied that Ms Oem and Mr Phith were in a genuine and continuing relationship, and, consequently, was not satisfied that the applicants met the requirements of cl.801.221 of Schedule 2 to the *Migration Regulations 1994* (“the Regulations”).
- 6 The applicants applied to the Tribunal for review. On 13 June 2021, the Tribunal affirmed the delegate’s decision refusing the applicants permanent partner visas.

MATERIAL RELIED UPON

- 7 The applicants relied upon:
- (a) their application filed on 1 July 2021 (“the application”);
 - (b) the affidavit affirmed by Salim Choeung, the third applicant, on 24 June 2021;

- (c) the court book filed on 22 December 2021;
- (d) the affidavit affirmed by Joel McComber on 23 December 2021; and
- (e) their written submissions filed on 8 March 2022.

8 The Minister relied upon:

- (f) his response filed on 14 July 2021;
- (g) the court book filed on 22 December 2021; and
- (h) his written submissions filed on 14 March 2023.

LEGISLATION

9 Section 5F of the Act provided that:

- (1) For the purposes of this Act, a person is the *spouse* of another person if, under subsection (2), the 2 persons are in a married relationship.
- (2) For the purposes of subsection (1), persons are in a *married relationship* if:
 - (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
 - (b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
 - (c) the relationship between them is genuine and continuing; and
 - (d) they:
 - (i) live together; or
 - (ii) do not live separately and apart on a permanent basis.
- (3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

10 Regulation 1.15A of the Regulations provided that:

- (1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - ...
 - (c) a Partner (Residence) (Class BS) visa; or
 - ...

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

11 Clause 801.2 of Schedule 2 to the Regulations relevantly provided that:

801.2 - Primary criteria

Note: The primary criteria must be satisfied by at least 1 member of a

family unit. The dependent child of an applicant who satisfies the primary criteria is also eligible for the grant of the visa if the child satisfies the secondary criteria.

801.21 - [No criteria to be satisfied at time of application.]

801.22 - Criteria to be satisfied at time of decision

801.221

- (1) The applicant meets the requirements of subclause (2)
- (2) An applicant meets the requirements of this subclause if:
 - (a) the applicant is the holder of a Subclass 820 visa; and
 - (b) the applicant continues to be sponsored for the grant of the Subclass 820 (Partner) visa by:
 - (i) the sponsoring partner; or
 - (ii) the Australian citizen, Australian permanent resident or eligible New Zealand citizen who sponsored the applicant for that visa; and
 - (c) the applicant is the spouse or de facto partner of the sponsoring partner; and
 - (d) ... at least 2 years have passed since the application was made.

...

GROUND 1

- 12 The first ground of review in the application is:

The Tribunal's decision dated 13 June 2021 is affected by jurisdictional error as the Tribunal misapprehended the criteria to be satisfied by the First Applicant.

Particulars

- A. The Tribunal considered the First Applicant's eligibility for grant of a subclass 801 visa on the basis at (sic) that Clause 801.211 of Schedule 2 to the *Migration Regulations 1994* (the Regulations) required that at the time the visa application was made, the First Applicant was the spouse of the Australian citizen sponsor.
- B. However:
 - (i) a Clause 801.211 in Schedule 2 to the Regulations has never existed; and
 - (ii) sub-division 801.21 provides that the First Applicant was not required to satisfy any criteria at the time of application.
- C. In the premises, the Tribunal misapprehended the relevant law to be applied in determining the First Applicant's application for a subclass 801 visa and that misapprehension amounts to jurisdictional error.
- D. In relation to the issue of materiality, it is noted that the Tribunal only

expressed a positive finding that the First Applicant did not meet ‘clause 809.211 [sic] of the Regulations.’ The Tribunal did not record any conclusive finding that the First Applicant did not meet clause 801.221 of the Regulations (i.e., that the First Applicant was the spouse of the sponsor at the time of decision).

13 The relevant passages from the Tribunal’s reasons for decision are as follows:

3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy clause 801.211 of the Regulations ...

...

11. Clauses **801.211(2)** and 801.221 of the Regulations require that **at the time the visa application was made, and at the time of this decision**, the visa applicant is the spouse or de facto partner of an Australian citizen ...

...

52. The Tribunal has carefully considered all of the evidence before it. Having regard to all of the circumstances of the relationship and the evidence taken as a whole, the Tribunal cannot be satisfied that **when the application was made and at the time of this decision**, the applicants have a mutual commitment to a shared life to the exclusion of others or that their relationship is genuine and continuing. **At the time of the application**, based on the evidence before the Tribunal, the Tribunal considers the applicants do not live together, or not separately and apart, on a permanent basis.

53. On the basis of the above the Tribunal is not satisfied that the requirements of section 5F(2) are met **at the time the visa application was made or at the time of this decision**.

54. Therefore, the first named applicant does not meet clause **809.211** of the Regulations.

(emphasis added)

14 The Tribunal was wrong in paragraph 3 of its reasons for decision to state that the delegate refused the visa application on the basis that Ms Oem did not satisfy cl.801.211 of Schedule 2 of the Regulations. The delegate did not refuse the visa application on that basis. The delegate expressly refused the visa application on the basis that Ms Oem did not meet cl.801.221 of Schedule 2 of the Regulations: CB242.

15 The Tribunal was also wrong in paragraph 11 of its reasons for decision to state that cl.801.211(2) of the Regulations requires that, at the time the visa application was made, Ms Oem was the spouse of an Australian citizen. In fact, as the applicants said at paragraph 22 of their written submissions:

... there is not, and never has been, a Schedule 2 Criteria 801.211.

16 Following the general format of Schedule 2 of the Regulations, cl.801.21 would have set out
the time of application criteria. However, cl. 801.21 of Schedule 2 to the Regulations says
now and has always said:

801.21 - [No criteria to be satisfied at time of application.]

17 Although the words, “No criteria to be satisfied at time of application”, are in square
brackets, those words are actually in the Regulations with square brackets around them.

18 The reason that there are no criteria for a permanent partner visa at the time of application is
possibly, as the Minister submitted at paragraph 11 of his written submissions, that:

the applicant will generally already have been assessed against the time of
application criteria for the provisional temporary (subclass 820) visa.

19 The Tribunal was wrong in paragraph 52 of its reasons for decision to say that it could not be
satisfied that, at the time of application, Ms Oem and Mr Phith had a mutual commitment to a
shared life. The Tribunal was also wrong to say that it considered that, at the time of
application, they did not live together on a permanent basis. That is because there were no
such requirements at the time of application.

20 The Tribunal was wrong in paragraph 53 of its reasons for decision to state that it was not
satisfied that:

... the requirements of section 5F(2) are met at the time the visa application was made
...

21 As discussed, there was no requirement for s.5F(2) of the Act to be met at the time of
application.

22 The Tribunal was wrong to say in paragraph 54 of its reasons for decision that Ms Oem did
not meet cl.809.211 of Schedule 2 of the Regulations. There is no cl.809 of Schedule 2 of the
Regulations. Even if it is assumed that the Tribunal intended to refer to cl.801, there was no
cl.801.211, and cl.801.21 said there were no time of application criteria for Ms Oem to meet.

23 The Minister conceded that the Tribunal made all of the errors mentioned above. However,
the parties were in dispute about the effect of the errors.

24 The applicants submitted that the Tribunal, by misidentifying and misapplying the criteria to
be applied, made a jurisdictional error that was material. The applicants said that the
jurisdictional error infected the whole decision. The Minister, on the other hand, said that the

error just led the Tribunal to ask a superfluous question, which had no bearing on the outcome.

25 In his written submissions filed on 14 March 2023, the Minister said in relation to this ground:

12. ... the applicant in this case was required to meet cl 801.221, which had to be satisfied at the time of decision. Relevantly, cl 801.221(2) was as follows:

(2) An applicant meets the requirements of this subclause if:

...

(c) **the applicant is the spouse or de facto partner of the sponsoring partner;** and

13. The Tribunal recognised this requirement. It said (**CB 511 [11]**) (emphasis added):

Clauses 801.211(2) and **801.221** of the Regulations require that at the time the visa application was made, **and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen** or Australian permanent resident or eligible New Zealand citizen.

14. As can be seen, although the Tribunal wrongly imposed a time of application requirement, the Tribunal correctly recognised that the applicant needed to satisfy the Tribunal that she was the spouse of the sponsor at the time of the Tribunal's decision.

15. Despite the error in the Tribunal's reasons, it is clear beyond doubt that the Tribunal in truth considered whether the applicant was the spouse of the sponsor at the time of decision. The Tribunal's reasons turn on its consideration of events that post-date the visa application (on 9 July 2013). For example, in relation to the:

15.1. financial aspects of the relationship: the Tribunal considered the parties' recent jobs and income; bank statements from 2020,¹ the purchase of a freezer, oven, and heater in 2015;² and that the parties had not purchased a house *since* 2013.³

15.2. nature of the household: the Tribunal considered the sponsor's travel history after July 2013, and the current relationships between the sponsor and the secondary applicants.⁴

15.3. social aspects of the relationship: the Tribunal considered the wedding, which predated the visa application. Nevertheless, this was a relevant consideration to whether they presented themselves as being married. The Tribunal considered statutory declarations and statements from the parties' friends, all filed in 2015.⁵ And the Tribunal considered the parties' travel history in 2017, which included that they were in Cambodia at the same time in 2017 (but apparently did not recall this fact).⁶

15.4. nature of the parties' commitment to each other: the Tribunal considered the 8-year period of marriage, their living arrangements

for 6 years, much of which necessarily post-dated 9 July 2013.

16. A fair reading of the Tribunal's reasons demonstrates that the Tribunal was not considering whether the applicant was the spouse of the sponsor as at 9 July 2013 (the time of the application). It was assessing whether the applicant was the spouse of the sponsor at the time of its decision. The Tribunal concluded by saying (emphasis added):⁷

... Having regard to all of the circumstances of the relationship and the evidence taken as a whole, the Tribunal cannot be satisfied that when the [application] was made **and at the time of this decision**, the applicants have a mutual commitment to a shared life to the exclusion of others or that their relationship is genuine and continuing. ...

On the basis of the above the **Tribunal is not satisfied that the requirements of section 5F(2) are met** at the time the visa application was made **or at the time of the decision**.

17. It is clear that the Tribunal did not consider that the applicant was the spouse of the sponsor at the time of the decision. Albeit not expressly stated, there is no way of reading this statement other than as a finding directed to cl 801.221 of the Regulations. This finding was fatal to the success of the application.
18. Any error that the Tribunal made in also imposing a time of application requirement was thus immaterial. "The postulated legal error at most led the Tribunal to ask a superfluous question".⁸
19. There is no substance to the applicants' contention at AS [26] that "the Tribunal's enquiries in relation to the imagined 801.211 criterion infected its decision so far as it related to the requirements of criterion 801.211". The applicant points to the fact that the Tribunal "drew significant adverse inferences from events occurring between 2013 and 2015". This was clearly relevant to considering whether the parties were spouses at the time of decision. The sponsor's travel history in 2015 could not have been relevant to whether the parties were spouses as at 9 July 2013.

20. Accordingly, ground one should be rejected.

FN1: See, CB 512 [20]; CB 363-370.

FN 2: See CB 513 [21]; CB 206-209.

FN 3: CB 513 [22].

FN 4: See, CB 513 [25]-[29].

FN 5: See, CB 132; 135; 170; 172.

FN 6: See, CB 515 [38].

FN 7: CB 517, [52]-[53].

FN 8: See, *Shrestha v Minister for Immigration and Border Protection* (2018) 264 CLR 151, at [10]; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123.

26 In *Shrestha v Minister for Immigration and Border Protection* (2018) 264 CLR 151; (2018) 359 ALR 22; [2018] HCA 35, the plurality of the High Court said:

1. ... an incorrect understanding and application of the law in making a decision ... does not constitute a jurisdictional error justifying the grant of relief ... if a correct understanding and application of the law could not in the circumstances have resulted in the decision that was made being a different decision.

...

10. For the reasons given in *Hossain v Minister for Immigration and Border Protection*, the fact that the postulated legal error could have had no impact on the Tribunal's decisions denied that error the character of a jurisdictional error. The postulated legal error at most led the Tribunal to ask a superfluous question. The Tribunal's reasons for decision in each case make perfectly clear that its treatment of the relevant circumstance (as meeting the enrolment element of the definition of an "eligible higher degree student", rather than as enrolment in the particular course in which the visa holder had been enrolled at the time of grant of the visa) did not impact on anything which the Tribunal otherwise did in finding facts and in reasoning to a conclusion as to the preferable exercise of discretion. For that reason, the postulated legal error could not have taken the decision of the Tribunal beyond the authority conferred on the Tribunal.

27 In *Shrestha*, the applicant had a student visa. The requirements for the grant of the student visa included that the applicant was enrolled in a course. The visa could be cancelled if any of the circumstances that permitted the grant of the visa no longer existed. The applicant ceased to be enrolled in the course. The Tribunal found that the ground for cancellation existed, and then decided, in the exercise of its discretion, that the visa should be cancelled.

28 A majority of the Full Court of the Federal Court considered that the Tribunal had misconstrued the word "circumstances" in deciding that the ground for cancellation existed. However, the majority considered that the error could have had no impact on the Tribunal's decision, because the applicant had in fact ceased to be enrolled in the course. The High Court upheld that decision.

29 In *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; (2018) 359 ALR 1; (2018) 92 ALJR 780; [2018] HCA 34, the applicant applied for a partner visa. Relevantly, the applicant had to:

- (i) apply for the visa within 28 days of his last visa ceasing, unless there were compelling reasons to not apply that criterion; and
- (j) have no outstanding debts to the Commonwealth, unless the Minister was satisfied there were appropriate arrangements to pay.

30 The Tribunal mistakenly thought that the question of whether there were compelling reasons in relation to paragraph (a) above had to be determined as at the time of application. In fact, that question had to be determined as at the time of decision.

31 The plurality of the High Court in *Hossain* held at [35] that the Tribunal's error was not jurisdictional because the decision could not have been different in circumstances where the applicant had not satisfied the requirement in paragraph (b) above. To similar effect, Nettle J said at [41] that:

... since the Tribunal's error in relation to [(a)] was separate from and independent of the decision which the Tribunal was required to make in relation to [(b)], and could not possibly have affected the Tribunal's decision in relation to [(b)], the error in relation to [(a)] was not a jurisdictional error.

32 In my view, the present case differs from *Hossain* and *Shrestha* in that there was not an entirely separate strand of reasoning that was not impugned, and there was not a critical criterion that the applicants did not meet, on any view.

33 In the present case, the Tribunal bundled up its consideration of the applicants' circumstances at the time of application with its consideration of the applicants' circumstances at the time of decision.

34 In particular, in its consideration of the social aspects of the relationship at paragraph 33 of its reasons for decision, the Tribunal expressly referred to and repeated its discussion at paragraph 17 of its reasons for decision. That paragraph concerned the marriage between Ms Oem and Mr Phith, which occurred a few months prior to the application. Paragraph 17 of the Tribunal's reasons for decision is as follows:

... The applicants have filed a copy of their Marriage Certificate with the Tribunal which indicates they were married on 28 May 2013 which is consistent with their oral evidence. The applicants and Mr Phith all gave evidence that Ms Oem and Mr Phith were married in Noble Park. However, the Certificate of Marriage on the Department file states they were married at '23 Janelaine Court, Sorrento, Victoria' whereas the Registered Marriage Certificate states that the marriage took place at '23 Janelaine Court, Springvale South'. **The Tribunal is very puzzled by this.** However, the latter Marriage Certificate appears to be an authentic documents [sic] of the Registry of Births, Deaths and Marriages of Victoria and it appears the applicants were married to each other under a marriage that is valid for the purposes of the Act as required by section 5F(2)(a). The applicants' migration agent clarified in oral submissions at hearing that the applicants and Mr Phith all gave consistent evidence about the Noble Park location as that is where the reception occurred (at their family home). **The Tribunal still has reservations about this submission**, it may explain [the second and third applicant's] memories, but **one would expect the actual bride and groom to remember the location that their marriage vows took place.**

(footnotes omitted) (emphasis added)

35 The Certificate of Marriage, which appears to have been the document given to Ms Oem and Mr Phith on the wedding day (28 May 2013), says the marriage occurred at 23 Janelaine Court Sorrento: CB74. The formal Marriage Certificate, from the Registry of Births, Deaths and Marriages, (dated 8 April 2016) says the marriage occurred at 23 Janelaine Court, Springvale South: CB391. (Springvale South and Noble Park are neighbouring suburbs of Melbourne, whereas Sorrento is about 75kms away on the Mornington Peninsula.)

36 Critically, the formal Marriage Certificate says on its face:

THE BACK OF THIS DOCUMENT CONTAINS A HISTORY OF CHANGES OF NAME AND CORRECTIONS.

37 The back of the formal Marriage Certificate says (CB392):

HISTORY CERTIFICATE

This certificate contains a history of corrections made relating to the parties named on the front of this certificate.

Marriage Details [Place of Marriage] corrected on 31/7/13.
--

38 The words, “Place of Marriage”, were in square brackets on the certificate.

39 If the Tribunal had noticed that the formal Marriage Certificate had been officially corrected, the Tribunal would not have been “puzzled” about the discrepancy between the Certificate of Marriage given to the parties by the wedding celebrant and the formal Marriage Certificate. Nor would the Tribunal have been left with reservations about the claim that the parties were married in Noble Park. (Noble Park adjoins Springvale South. That discrepancy is not significant, especially as there was no inconsistency in the claims that the wedding reception took place at Noble Park.) Nor would the Tribunal have made the disparaging comment that:

... one would expect the actual bride and groom to remember the location that their marriage vows took place.

40 As mentioned above, the Tribunal incorporated its consideration of the Marriage Certificate into its consideration of the social aspects of the relationship. It said at paragraph 33 of its reasons for decision:

All four individuals gave consistent evidence at hearing that there were 30 people at the wedding which included Mr Phith’s four children from a previous relationship. **It seems peculiar to the Tribunal that they could remember this yet not recall where the wedding vows actually took place.** The Tribunal refers to and repeats the concerns set out in paragraph 17 above. (emphasis added)

- 41 In fact, Ms Oem and Mr Phith could remember where the wedding took place (with due allowance for the slight difference between the place of the wedding and the place of the wedding reception.)
- 42 Ultimately, the Tribunal said that it gave “some weight” to the social aspects of the relationship. Obviously, if the Tribunal had noticed that the Marriage Certificate was officially corrected, the Tribunal might have given more weight to the social aspects of the relationship, and might have found that the marriage was genuine.
- 43 It follows that the Tribunal did not have an entirely separate and valid strand of reasoning that supported its ultimate decision, unlike *Hossain*. Equally, there was no criterion that, on any view, the applicants did not meet, unlike *Shrestha*.
- 44 *Shrestha* talks of a decision that “could” have been different, not that “would necessarily” have been different. There were a number of findings that suggest that if the Tribunal had noticed that the Marriage Certificate had been officially corrected, the decision might well have been different. For example, the Tribunal said:

Financial Aspects of the Relationship

...

23. The Tribunal accepts that Ms Oem and Mr Phith appear to be pooling their limited financial resources and share responsibility for financial commitments. ...

...

Nature of the Household

25. Ms Oem and Mr Phith have made consistent statements and given consistent evidence that they share household tasks with Ms Oem undertaking most of the housework and Mr Phith mowing the lawn and undertaking all handyman requirements. They have filed a number of photos of them doing various household related activities together.

...

28. ... There are several photos with all four individuals together, sharing meals, undertaking activities together and/or celebrating religious events together. They all appear happy in these photos. ...

...

Nature of the applicants’ commitment to each other

...

42. The Tribunal acknowledges that Ms Oem and Mr Phith have now been married for more than eight years and that for six of these years the

documents suggest they have lived together as a family with Ms Oem's two sons, the second and third applicants.

43. Ms Oem and Mr Phith gave consistent evidence about their religious beliefs and practices, their hobbies, and their drinking and smoking habits. ...

...

45 All in all, I am not satisfied that the numerous errors made by the Tribunal about needing to assess the relationship between Ms Oem and Mr Phith as at the time of application can be regarded as immaterial. I consider that they amount to jurisdictional error in the circumstances of this case.

46 Ground 1 is made out.

GROUND 2

47 The second ground of review in the application is:

The Tribunal's decision dated 13 June 2021 is affected by jurisdictional error as the Tribunal misapprehended the criteria to be satisfied by the Second and Third Applicant.

Particulars

- A. The Tribunal considered the Second and Third Applicants' eligibility for the grant of a subclass 801 visa on the basis that, as secondary applicants, they were required to be dependent children at the time of decision.
- B. However,
- (i) clause 801.311(2) only required that the Second and Third Applicants were dependent children at the time of application; and
 - (ii) sub-division 801.32 of Schedule 2 to the Regulations, which prescribes the criteria to be satisfied at the time of decision, does not require secondary applicants to satisfy the definition of 'dependent child' at the time of decision.
- C. In the premises, the Tribunal misapprehended the relevant law to be applied in determining the Second and Third Applicants' applications for a subclass 801 visa and that misapprehension amounts to jurisdictional error.

48 The relevant passages from the Tribunal's reasons for decision are as follows:

47. The definition of 'member of the family unit' sets an upper limit of 23 years for children or stepchildren who are dependent (unless they are incapacitated for work). Under regulation 1.12A child or step child is a member of the family unit of another person (the family head) if they are: not engaged or married; either under 18 years old, or aged 18-22 and dependent on the family head (or the family head's partner), or has turned 23 but is wholly or substantially reliant on the family head (or partner) because they are incapacitated for work due to loss of bodily or mental functions.

48. Mr Salim and Mr Seak are the children of Ms Oem and stepchildren of Mr Phith pursuant to section 5CA of the Act and regulation 1.03.
49. 'Dependent child' [w]as defined in regulation 1.03 and includes minors under the age of 18 as well as children over the age of 18 who are 'dependent' on their parent(s) or are incapacitated for work due to the total or partial loss of bodily or mental functions. 'Dependent' is defined in regulation 1.05A and essentially means reliant for financial support to meet basic needs for food, clothing, and shelter.
50. The evidence given at hearing was that Mr Salim and Mr Seak are both working full time, in good health and helping to support the household financially. They are 26 and 24 years of age respectively. Due to their age, the only way in which they could meet the requirements of the Act and Regulations would be if they were incapacitated for work due to loss of bodily or mental functions. This is clearly not the case and their applications must necessarily fail independently of their mother's application.
- ...
55. Given paragraphs 46-50 above, the second and third applicants do not meet the criteria of section 5(1) of the Act. However, their applications would also fail in any case because the primary application has failed, and they are secondary applicants to that application.

(footnotes omitted)

49 In their written submissions filed on 8 March 2022, the applicants said in relation to this ground:

14. The Tribunal fundamentally misapprehended the requirements of Schedule 2 Criterion 801.311 as it related to the Second and Third Applicants.
15. Schedule 2 Criterion 801.311 is contained within section 801.31, which sets out the criteria to be satisfied [by the] secondary applicants for a subclass 801 visa *at the time of application*. Section 801.32 prescribes the criteria to be satisfied *at the time of decision*.
16. Schedule 2 Criterion 801.311 relevantly provides:
 - (1) The applicant meets the requirements of subclause (2) or (3).
 - (2) An applicant meets the requirements of this subclause if the applicant is:
 - (a) a dependent child of a person who has applied for a Partner (Residence) (Class BS) visa; or
 - (b) a member of the family unit of a person who:
 - (i) is the holder of, or has been the holder of, a Subclass 300 (Prospective Marriage) visa; and
 - (ii) has applied for a Partner (Residence) (Class BS) visa; and the Minister has not decided to grant or refuse to grant a visa to the person.

17. While Schedule 2 Criterion 801.321(a)(i)(C) requires that a secondary application be holder of a subclass 820 visa granted on the basis that its holder was dependant child, it does not require, nor does any other Schedule 2 criteria require, a secondary applicant to be a dependent child at the time of determining an application for a subclass 801 visa.
18. Despite:
 - (a) not explicitly identifying Schedule 2 Criterion 801.311 as the criterion against which it was assessing the Second and Third Applicants at [46] to [50] of its reasons; and
 - (b) not setting out, even in summary, the requirements of Schedule 2 Criterion 801.311,

it is reasonably obvious that the Tribunal's intended finding was that the Second and Third Applicants did not satisfy Criterion 801.311.
19. At [46] to [51] the Tribunal clearly assessed whether the Second and Third Applicants are *currently* dependent children of the First Applicant. It wholly failed to direct its attention to the actual requirement of 801.311, which is whether the Second and Third Applicants were dependent children as at 9 July 2013, the date on which their application for a subclass 801 visa was lodged.
20. In the premises, the Applicant submits that the Tribunal wholly and completely [mis]understood the criteria it was required to assess the Second and Third Applicants against, such that's (sic) its decision is affected by jurisdictional error (subject to the issue of materiality, as indicated above).

50 In his written submissions filed on 14 March 2023, the Minister said in relation to this ground:

22. ... The Minister concedes that the Tribunal's consideration of whether the secondary applicants were currently dependent children of the primary applicant was wrong at law, for the reasons explained by the applicant at AS [15]-[19].
23. However, that error was immaterial (and it appears the applicants accept this: see, AS [20] and AS [13]). The Tribunal had purported to identify a reason why the secondary applicants' applications must fail independently of their mother's application. The Tribunal concluded by saying:

Given paragraphs 46-50 above, the second and third applicants do not meet the criteria of section 5(1) of the Act. **However, their applications would also fail in any case because the primary application has failed and they are secondary applicants to that application.**
24. In other words, the Tribunal identified a separate and wholly independent basis for concluding that the secondary applicants' application must fail: their applications could not succeed without their mother's application succeeding. That reasoning has not been challenged in ground two, nor is there any basis to challenge it.
25. Accordingly, this ground must fail. (The Minister accepts that, if the applicant can show jurisdictional error in relation to the mother's application

on either grounds one, three or four, then relief should be granted with respect to all three applicants).

(footnotes omitted)

51 In view of the Minister's entirely appropriate concession, and as the applicants have shown jurisdictional error in relation to the application on ground 1, ground 2 also succeeds.

GROUND 3

52 The third ground of review in the application is:

The Tribunal's decision dated 13 June 2021 is affected by jurisdictional error as by failing to provide the First Applicant and the sponsor a meaningful opportunity to address specific credibility concerns when giving evidence at hearing, it constructively failed to exercise its jurisdiction.

Particulars

- A. In determining to refuse the First Applicant's application for a subclass 801 visa, the Tribunal:
 - (i) expressed reservations regarding the First Applicant and sponsor's evidence that their wedding took place in the suburb of Nobel Park, when their marriage certificate recorded their marriage taking place at Springvale South;
 - (ii) was 'troubled' that the First Applicant and the sponsor do not wear wedding rings;
 - (iii) expressed concerns that photos provided to the Tribunal appeared 'affected and unnatural,' and 'that they may have been taken to create a paper-trail;'
 - (iv) expressed concerns that the First Applicant and her sponsor did not recall each being present in Cambodia from 19 March 2018 to 22 April 2017.
- B. None of the issues identified by the Tribunal listed at (A)(i)-(iv) above were put to the First Applicant or sponsor by the Tribunal, despite those issues apparently playing a central role in the Tribunal's ultimate determination that the First Applicant and sponsor:
 - (i) did not currently have a mutual commitment to a shared life as a married couple to the exclusion of all others; and
 - (ii) were not currently in a genuine and continuing relationship.
- C. In the premises, the Tribunal's failure to provide the Applicant and the sponsor with a meaningful opportunity to address specific concerns amounted to jurisdictional error.

53 In their written submissions filed on 8 March 2022, the applicants said in relation to this ground:

36. The combined effect of the provisions of Division 5 or Part 5 of the Act is

that the opportunity afforded to a witnesses nominated by an applicant under s 361(2), and who the Tribunal decides to take evidence from, must be ‘real and meaningful and not just an empty gesture.’⁴

37. What constitutes a meaningful opportunity to present evidence on the part of a person nominated by the applicant under s 361(2) is fact dependent in each case.⁵
38. Failure by the Tribunal to afford an applicant or a person nominated by the applicant under s 361(2) (and who the Tribunal has decided to take evidence) a meaningful opportunity to present evidence amounts to unreasonableness in the legal sense and, therefore, jurisdictional error.⁶
39. In *Huynh v Minister for Immigration and Border Protection*,⁷ Justice Griffiths of the Federal Court of Australia found that the Tribunal’s failure to put specific credibility issues to a witness, where those credibility concerns were central to the Tribunal’s ultimate decision to refuse a visa application, was unreasonably (sic) in the legal sense and quashed the Tribunal’s decision.
40. We submit that the circumstances of the present case [are] analogous to those in *Huynh*. The Tribunal’s adverse credit findings included:
 - (a) its reservations regarding the First Applicant and sponsor’s evidence that their wedding took place in the suburb of Nobel Park, when their marriage certificate recorded their marriage taking place at Springvale South;
 - (b) its being ‘troubled’ that the First Applicant and the sponsor do not wear wedding rings;
 - (c) expressed concerns that photos provided to the Tribunal appeared ‘affected and unnatural,’ and ‘that they may have been taken to create a paper-trail;’
 - (d) expressed concerns that the First Applicant and her sponsor did not recall each being present in Cambodia from 19 March 2018 to 22 April 2017.
41. None of these reservations were put to the Sponsor in examination and they were, ultimately relied on in affirming the decision under review.
42. In the premises, it is submitted that the Tribunal’s decision is affected by jurisdictional error.

FN 4: *Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin* (2005) 88 ALD 304 at [38].

FN 5: *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [51].

FN 6: *Huynh v Minister for Immigration and Border Protection* (2015) 232 CLR 497 at [91].

FN 7: (2015) 232 CLR 497.

- 54 In his written submissions filed on 14 March 2023, the Minister said in relation to this ground:

28. This ground must fail. None of these “findings” by the Tribunal represented a surprising conclusion not obviously open on the known material. Importantly, the matters which the applicants contend must have been put to the parties were “reservations”, “troubles” and “concerns”. These are “mental processes or provisional views”, and the Tribunal is not required to give its subjective appraisal of the evidence to the applicant, or provide advance notice of its findings to the applicants for comment.¹¹
 29. Further, and in any event, the Tribunal adequately raised these issues with the parties. The Tribunal asked the applicant which suburb she got married in,¹² whether they exchanged rings;¹³ when the parties had travelled to Cambodia;¹⁴ The Tribunal asked the sponsor which suburb he got married in;¹⁵ whether they wore wedding rings;¹⁶ and when the parties had travelled to Cambodia.¹⁷ The Tribunal also asked the secondary applicants about the location of the wedding;¹⁸ exchange of wedding rings.¹⁹ The Tribunal did not ask about the photographs, but this was a quintessential mental process.
 30. *Huynh v Minister for Immigration and Border Protection*²⁰ does not assist the applicant. That case is “nothing more than a conclusion on particular facts of unreasonableness”.²¹ But unreasonableness is “invariably fact dependent and requires evaluation of the evidence”.²² It is not the correct approach to “engage in an analysis which merely involves identifying particular factual similarities or differences between individual cases”.²³
 31. Further, the Tribunal’s hearing in *Huynh* was markedly different to the hearing in the present case. In *Huynh*, the Tribunal only asked three very general questions to the visa applicant.²⁴ Griffiths J identified ten different matters which formed part of the Tribunal’s reasons for rejecting the review, about which the visa applicant was asked no direct questions.²⁵
 32. In contrast, the applicant and the sponsor in this case were asked many very specific questions about their relationship and were directed to topics upon which the Tribunal evidently had concern.²⁶
 33. In these circumstances, the Tribunal did not act unreasonably or deny the applicant procedural fairness. Ground three must be rejected.
- FN 11: See, *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, at [9]; *SZYBR v Minister for Immigration and Citizenship* (2007) 147 CLR 297, at [18]; *SZBEL v Minister for Immigration and Multicultural Affairs and Indigenous Affairs* (2006) 228 CLR 152, at [29], citing *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591-592; and *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 96 ALJR 13, at [32].
- FN 12: Transcript, P-12, lines 11-29.
- FN 13: Transcript, P-12, line 32 P-13, line 9.
- FN 14: Transcript, P-14, lines 17-38.
- FN 15: Transcript, P-29, lines 1-20.
- FN 16: Transcript, P-30, lines 5-32.
- FN 17: Transcript, P-31, lines 8-23.

FN 18: Transcript, P-40, line 35 – P-41, line 5; Transcript, P-44, lines 17-20.

FN 19: Transcript, P-41, line 26 – P-42, line 17; Transcript, P-45, lines 1-5.

FN 20: (2015) 232 FCR 497 (*Huynh*).

FN 21: *Salter v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 2054.

FN 22: *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, at [47].

FN 23: See, *DPII7 v Minister for Home Affairs* (2019) 269 FCR 134, at [37].

FN 24: See, *Huynh*, at [22]-[25]. The questions were: (1) “Now, the delegate was concerned that this was not a genuine application, a genuine spouse application, and what do you say in regard to that?”; (2) “And can you tell me, can you describe your wife to me, describe her personality and what makes her a suitable partner for you?”; and (3) “Is there anything else that you wish to tell me about the application?”.

FN 25: *Huynh*, at [33].

FN 26: See, by analogy, *Hemmingway v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FedCFamC2G 153, at [89]-[90].

55 The Minister relied upon *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; (2006) 93 ALD 300; (2006) 231 ALR 592; (2006) 81 ALJR 515; [2006] HCA 63 at [48], where it was said that:

Secondly, as Lord Diplock said in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* (30),

“the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished.”

Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgment.

56 I accept the Minister’s submissions on this ground for the reasons that he gave. Basically, the delegate had decided the matter on the basis of the same issues that the applicants say they needed to be alerted to. They had been alerted to those issues by the delegate’s decision. Moreover, the points the applicants relied upon for this ground were in the nature of subjective appraisals and thought processes. It has long been established that decision-makers are not required to foreshadow them. Finally, the issues the applicants relied upon in this ground were dealt with in questioning by the Tribunal, thus distinguishing this case from

Huynh v Minister for Immigration and Border Protection (2015) 232 FCR 497; [2015] FCA 701.

57 Ground 3 is not made out.

GROUND 4

58 The fourth ground of review in the application is:

To the extent that the Tribunal was did (sic) not satisfied clause 801.221 [was met] on the basis that the First Applicant was not the spouse of the sponsor at the time of decision, the Tribunal's state of non-satisfaction was vitiated by illogicality and/or irrationality in its fact finding and reasoning processes.

59 At paragraph 27 of their written submissions filed on 8 March 2022, the applicants said in relation to this ground that:

If the Court:

- (a) infers that the Tribunal was not satisfied that the First Applicant met Schedule 2 Criterion 801.221 on the basis that she was not the spouse of the Sponsor at the time of the decision; and
- (b) this state of non-satisfaction was not vitiated, or infected, by the Tribunal's creation of a fictional Schedule 2 Criterion 801.211,

then the Applicant submits that the Tribunal's state of non-satisfaction was vitiated by illogicality or irrationality.

60 In effect, the applicants did not press ground 4 if ground 1 was made out. Consequently, there is no need to consider this ground further.

CONCLUSION

61 As two of the applicants' grounds have been made out, the decision of the Tribunal will be set aside, and the Tribunal will be required to determine the matter according to law. The Minister will be required to pay the applicants' costs of the proceeding.

62

I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Riley.

Associate:

Dated: 31 May 2023